STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL WILLIAMS
EDWARD WILLIAMS

Plaintiff

-vs-

MEMORANDUM DECISION

BEEMILLER, INC. d/b/a HI-POINT
CHARLES BROWN
MKS SUPPLY, INC.
INTERNATIONAL GUN-A-RAMA
KIMBERLY UPSHAW
JAMES NIGEL BOSTIC
CORNELL CALDWELL
JOHN DOE TRAFFICKERS 1 - 10

Index No. 7056/2005

Defendant

The above captioned matter, having come on by way of Defendant Beemiller, Inc., d/b/a Hi-Point (hereinafter "Beemiller") Notice of Motion to Dismiss Plaintiff's First Amended Complaint pursuant to the Protection of Lawful Commerce in Arms Act, (hereinafter PLCAA) dated November 24, 2009; the affirmation of Scott C. Allen, Esq., duly affirmed on November 24, 2009, together with exhibits attached thereto in support of certain relief; the Memorandum of Law in support of Defendant Beemiller's Motion to Dismiss Plaintiff's First Amended Complaint dated November 24, 2009; the Notice of Motion to Dismiss Plaintiff's First Amended Complaint for lack of personal jurisdiction and pursuant to the PLCAA on behalf of Defendant Brown, dated November 25, 2009; the affidavit of Defendant Charles Brown, duly sworn on November 25, 2009; the undated affirmation of Scott L. Braum, Esq., together with the exhibits attached thereto in support of certain relief; the Memorandum of Law in support of Defendant Charles Brown's Motion to Dismiss Plaintiff's First Amended Complaint for lack of personal jurisdiction and pursuant to the PLCAA dated November 25, 2009 and the Reply Memorandum in support of Defendant Charles Brown's Motion to Dismiss Plaintiff's First Amended Complaint for lack of personal

jurisdiction and pursuant to the PLCAA dated April 9, 2010; the Notice of Motion to Dismiss Plaintiff's First Amended Complaint on the grounds that Plaintiffs failed to state a cause of action and lack of jurisdiction on behalf of Defendant, MKS Supply, Inc. (hereinafter "MKS") dated November 24, 2009; the affirmation of Jeffrey M. Malsch, Esq. duly affirmed on November 24, 2009, together with the exhibits attached thereto in support of certain relief; the memorandum of law in opposition to motions to dismiss Plaintiff's First Amended Complaint by Defendants Beemiller, MKS and Brown, dated February 22, 2010; the reply memorandum in support of Defendant Charles Brown's motion to dismiss Plaintiff's First Amended Complaint for lack of personal jurisdiction and pursuant to the PLCAA dated April 9, 2010; the brief in reply to Plaintiff's opposition to, and in further support of, Defendant MKS' motion to dismiss dated April 9, 2010; the notice of motion to intervene dated April 16, 2010 by intervenor United States to defend the constitutionality of the PLCAA; the affirmation of Michael S. Cerrone, Esq., duly affirmed on April 16, 2010 in support of certain relief; the Plaintiffs memorandum of law in reply to the brief of the United States of America dated April 23, 2010; the correspondence of Terrence M. Connors, Esq., dated May 3, 2010, together with the exhibits attached thereto in further opposition and in reply and the correspondence of Scott L. Braum, Esq., dated May 11, 2010, together with the exhibit attached thereto in further support and in reply; and oral argument having been had hereon; this decision follows.

Preliminarily, a brief recitation of facts is warranted. It is alleged that Defendant Beemiller, a federally licensed manufacturer of firearms, manufactured a Hi-Point 9 mm semi automatic pistol, bearing serial number 502139 and sold it to Defendant MKS, a federally licensed wholesale distributor of firearms. Thereafter, Defendant MKS sold the Hi-Point pistol to Defendant Brown, a federally licensed retail firearms dealer. Defendant Upshaw purchased the pistol from Defendant Brown at an Ohio gun show in

October 2000. She then transferred the pistol to Defendant Bostic, completing what was ultimately found to be a "straw purchase". Defendant Bostic transported the pistol from Ohio to New York, where it was ultimately purchased by Defendant Caldwell.

In August 2003 Defendant Caldwell shot Plaintiff, Daniel Williams, having mistaken the then-minor for another. It is noted that Defendants Upshaw, Bostic and Caldwell were successfully prosecuted for their respective crimes.

This action was commenced by Plaintiff Edward Williams, individually and on behalf of his minor son, alleging various causes of action against the named Defendants seeking compensatory and punitive damages, costs, disbursements and attorney fees. Following service of Plaintiff's First Amended Complaint, the aforementioned Defendants have moved to have the Amended Complaint dismissed. The Court will address these respective arguments.

Defendant Beemiller argues that, as a federally licensed gun manufacturer, it enjoys the protections afforded under the "Protection of Lawful Commerce in Arms Act" ("PLCAA") 15 U.S.C. §§ 7901-7903. This act, in part, provides to manufacturers immunity from compensatory or punitive damages in a qualified civil action, which resulted from a criminal or otherwise unlawful misuse of a firearm by a third party, which had been shipped or transported in interstate commerce. Defendant Beemiller argues that the Act mandates the immediate dismissal of the instant action as all applicable prerequisites of the Act are met, and further, that none of the exceptions to the application of the Act exist at bar, ie. negligent entrustment, negligence per se and/or intentional statutory violations by or on behalf of Defendant Beemiller.

Similarly, Defendant Brown invokes the protections of the PLCAA as well as raises jurisdictional arguments in support of his motion to dismiss Plaintiff's First Amended Complaint. Defendant Brown argues that the claims

against him are precluded by the Protections of Lawful Commerce in Arms Act, and further, that the New York Long Arm Statute (CPLR §302) and the Due Process clause do not permit the state to exercise personal jurisdiction over him.

Finally, Defendant MKS alleges that they, too, are entitled to the protections of the PLCAA and/or that the Plaintiff's First Amended Complaint fails to state a cause of action against them.

In opposition, Plaintiff argues that the PLCAA is inapplicable, or alternatively, if applicable, is unconstitutional.

For the reasons that follow, Defendant Beemiller's Motion to Dismiss Plaintiff's First Amended Complaint is granted pursuant to CPLR 3211(a)(7).

Plaintiff's First Amended Complaint alleges some five causes of action against Defendant Beemiller: (1) negligent distribution and sale, (2) negligent entrustment, (3) negligence per se, (4) public nuisance and (5) intentional statutory violations. In addition, Edward Williams asserts a derivative cause of action.

As aforementioned, Defendant Beemiller invokes the protections afforded gun manufacturers under the PLCAA, arguing that it meets all qualifying definitions for such protection and further, that none of the exceptions to its application exist. The Court is in accord. Based on the allegations as contained in Plaintiff's First Amended Complaint, the within action is, in fact, a civil action or proceeding brought by a person against a manufacturer of a qualified product for damages sustained, based on a criminal use of the product by a third person. Thus, PLCAA applies to Defendant Beemiller, warranting dismissal of the Amended Complaint, in the absence of disqualifying exceptions to the application of the PLCAA. A review of the record is warranted.

Plaintiff asserts a cause of action against Defendant Beemiller for negligent entrustment, an exception to the immunity afforded manufacturers

of firearms in otherwise qualified civil actions. In essence, Plaintiff alleges that Defendant Beemiller negligently permitted Defendants MKS and Brown to acquire the subject pistol when it knew, or reasonably should have known, that they intended to, or were likely to, use it in a manner so as to create an unreasonable risk of harm to others. In addition, Plaintiff alleges that Defendants MKS and Brown only came to possess the pistol with Defendant Beemiller's consent, and that Defendant Beemiller should have known that it was reasonably foreseeable that Defendants MKS and Brown would use the pistol in a manner which created an unreasonable risk of harm to others and would supply the pistol to an illegal gun trafficker and that others would be injured by same.

However, by its own definition, the PLCAA's exception for immunity from liability in an otherwise qualified civil action for claims based on negligent entrustment and negligence per se, apply only to sellers, not manufacturers 15 U.S.C. §7901(b)(1). Therefore, the negligent entrustment exception to the PLCAA does not apply to Defendant Beemiller.

In addition, Plaintiffs allege a cause of action against Defendant Beemiller for negligence per se, based on purported violations of NY Penal Law §§400.05(1) and 240.45(1), as well as a conspiracy claim grounded in Defendant Bostic's alleged violation of NY Penal Law §265. Negligence per se arises from a violation of a statute designed for the protection of a particular class of individual. Moreover, in order to establish negligence per se, the statute purportedly violated must provide for a private right or cause of action.

Penal Law §400.05(1) authorizes the destruction of unlawfully possessed weapons seized by the police, and therefore, is not applicable to the case at bar. Therefore, this statute cannot serve as a predicate to the negligence per se exception to the PLCAA's definition of a qualified civil liability action.

Further, §240.45(1) is a statute designed to protect the public at large, rather than an identifiable, limited group of people. It is the codification of common law public nuisance, and requires a knowing or reckless act, rather than negligence as the basis for its violation.

In addition, Plaintiffs allege that Defendant Beemiller conspired with co-Defendant Bostic, culminating in co-Defendant Bostic's violation of NY Penal Law §265. However, as has been long established, one cannot conspire to commit an act of negligence. See generally, *In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 175 F.Supp 2d 593 [SDNY 2001]; *Sackman v. Liggett Group. Inc.*, 965 F.Supp 391 [EDNY 1997]; *Altman v Fortune Brands, Inc.*, 268 AD2d 213 [1st Dept.2000].

Therefore, based on the foregoing, the statutes alleged to have been violated by Defendant Beemiller do not support a viable negligence per se claim and thus, there is no negligence per se exception to the PLCAA's definition of a qualified civil liability action in the case at bar.

In addition, Plaintiff alleges that Defendant Beemiller committed "intentional violations of federal, state and local statutes, regulations and ordinances" which were a direct and proximate cause of Plaintiff's injuries. Please refer to Plaintiff's Amended Complaint, pages 246-247. Plaintiff avers that an "intentional" violation is tantamount to a "knowing violation" of state or federal statutes applicable to the sale or marketing of firearms, which was a proximate cause of harm for which relief is sought, another exception to the definition of qualified civil liability under the PLCAA. However, there are but two remotely drawn types of "knowing" violations applicable to the sale or marketing of firearms that serve as a predicate to the exception.

The first applies to situations where a manufacturer or seller knowingly fails or makes false entries in records required to be kept under Federal or State law, or aided and abetted in same. The second applies where the manufacturer or seller aided, abetted or conspired to sell or

dispose of a firearm, knowing or having reason to know, the actual buyer of the firearm was prohibited from receiving or possessing same. As aforementioned, the three statutes relied on by Plaintiff are those alleged as predicates to the negligence per se claim and have been deemed inapplicable to support that claim by this Court. Moreover, those statues are not the narrow types of statutes required to support an exception to an application of the PLCAA for the sale or marketing of firearms. See *Copart Indus. Inc. v Consolidated Edison Co. of NY Inc.*, 41 NY2d 564 [1977]; *New York Trap Rock Corp. v Town of Clarkson*, 299 NY 77 [1949]; *New York City v Beretta USA Corp.*, 524 G.3d 383 [2nd Cir.2008].

Therefore, Defendant Beemiller's motion to dismiss Plaintiff's First Amended Complaint, as well as the derivative claim asserted on behalf of Plaintiff Edward Williams, is granted.

Defendant Brown, a federal firearms licensee, has done business as a retail seller of firearms under the name "Great Lakes Products" since 1996. Defendant Brown has moved this Court to dismiss Plaintiff's First Amended Complaint pursuant to CPLR 3211(a)(7) on the grounds that Plaintiff has failed to state a cause of action against Defendant Brown, under CPLR 3211(a)(8) alleging lack of personal jurisdiction and under CPLR 3211 (a)(2) for lack of subject matter jurisdiction.

The claims asserted against Defendant Brown are substantially similar to those asserted against Defendant Beemiller: negligent distribution and sale, negligent entrustment, negligence per se, public nuisance and a derivative claim asserted on behalf of Plaintiff, Edward Williams. As aforementioned, Defendant Brown contends that the PLCAA requires dismissal of the within action and further, that the New York long arm statute and Due Process clause do not confer personal jurisdiction over Defendant Brown, providing another basis for dismissal.

As is conceded, Defendant Beemiller, a federally licensed firearms manufacturer made a Hi-Point semi automatic pistol bearing serial

number 502139 and sold it to Defendant, MKS Supply, Inc., a federally licensed firearms wholesaler. Thereafter, Defendant MKS sold the firearm to Defendant Brown, a federally licensed retailer, who ultimately sold the gun to Defendant Upshaw at an Ohio gun show in October 2000. The gun was purportedly transferred to Defendant Bostic , transported from Ohio to New York and ultimately sold to Defendant Caldwell. Please refer generally to Plaintiff's Amended Complaint ¶ 4 - 7, 41, 52, 54, 228. In August of 2003, Defendant Caldwell shot Plaintiff Daniel Williams in the City of Buffalo.

Defendant Brown asserts that Plaintiff's claim must fail for lack of personal and/or subject matter jurisdiction as well as pursuant to the protections afforded retailers under the PLCAA. The Court will address Defendant's jurisdiction arguments first.

As the Amended Complaint is devoid of any suggestion that a basis for personal jurisdiction under CPLR 302 is predicated on Defendant Brown either transacting business within the state or the commission of a tortious act within the state, only an analysis of CPLR 302(a)(3) is warranted. That statute will confer personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to a person or property within the state, . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state or (ii) expects, or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . ." See CPLR 302(a)(3).

As is axiomatic, plaintiffs have the burden of proof that the pre-requisites of CPLR 302(a)(3) are satisfied so as to confer jurisdiction over a non-domiciliary, *Ying Jung Chen v Lei Shi*, 796 NYS2d 126 [2nd Dept.2005]; *Spectra Products v Indian River Citrus*, 144 AD2d 832 [3rd Dept.1988]. That burden, however, does not require making a prima facie showing of personal

jurisdiction; rather the plaintiffs need only demonstrate that facts "may exist" to exercise personal jurisdiction over defendant Brown. *Tucker v Sanders*, 75 AD3d 1096, 904 NYS2d 618 [4th Dept.2010]; *Allsafe Technologies, Inc. v Charles Benz, doing business as Digital Card Systems*, 74 AD3d 1759, 902 NYS2d 462 [4th Dept.2010].

Thus, a careful review of the allegations in Plaintiffs' First Amended Complaint, taken as true after affording plaintiffs every possible favorable inference, must be undertaken.

Defendant Brown argues that plaintiffs failed to allege facts establishing that defendant Brown committed a tortious act outside New York, which is a condition precedent to establishing jurisdiction under CPLR 302(a)(3). The acts alleged as tortious involve the sale of firearms in the State of Ohio. The Supreme Court of the State of Ohio has made clear that such sales may constitute a public nuisance as well as negligence. *City of Cincinnati v Beretta*, USA Corp. 95 Ohio St. 3rd 416 [2002]. The allegation in plaintiffs' complaint sufficiently allege tortious acts as against defendant Brown.

However, plaintiffs have failed to allege facts sufficient to satisfy the second prong of a jurisdiction analysis: that defendant Brown regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in New York. *Ingraham v Carroll*, 665 NY2d 10 [1997].

It should be noted that this Court is cognizant of plaintiffs' argument that defendant Brown and defendant MKS are somewhat indistinguishable. However, at the time the subject sale was made, defendant Brown was an employee of defendant MKS. At all relevant times, defendant MKS was a federally licensed firearms distributor that purchased products for resale. Defendant Brown, at the time of sale, was an employee of defendant MKS, and further, maintained a separate federal firearms

license as Great Lakes Products, which permitted him only to sell firearms in Ohio to Ohio residents.

This Court is concerned that plaintiffs have offered ATF trace data that was previously deemed confidential and was prohibited from use in the subject lawsuit, in support of its jurisdictional argument. As such, this Court will not consider it.

The plaintiffs refer this Court to a line of cases decided by the Hon. Jack B. Weinstein of the United States District Court for the Eastern District of New York, which they rely on to support a finding of personal jurisdiction over the defendants named herein. *City of New York v Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237 [E.D.N.Y. 2008], also *City of New York v A-1 Jewelry & Pawn, Inc.*, 501 F.Supp. 2d 369 [E.D.N.Y. 2007]. This Court is unpersuaded by the Weinstein cases.

Thus, plaintiffs have failed to allege the requisite indicia to find a basis for this Court to exercise personal jurisdiction over defendant Brown.

However, this finding does not end the inquiry. As aforementioned, plaintiffs need only demonstrate facts "may exist" to exercise such jurisdiction (*Tucker*, supra., *Allsafe Technologies, Inc.*, supra).

Plaintiffs contend they have conducted no discovery in the subject action, and may, through the exercise of discovery, develop facts sufficient to exercise personal jurisdiction over defendant Brown. Defendant Brown contends that, to the contrary, extensive discovery, including depositions have been conducted, and plaintiffs have failed to establish grounds sufficient to find personal jurisdiction. The Court is in accord. It is noted that plaintiff's counsel herein received relief from a protective order in the New York City case to use the Brown deposition taken therein, in the case at bar. It is further noted that not one page of transcript has been offered by plaintiffs herein. Therefore, plaintiff cannot now be heard to argue that they require further discovery on this issue.

Therefore, in sum, while plaintiffs have alleged a valid underlying Ohio tort sufficient to establish jurisdiction under CPLR 302(a)(3), plaintiffs have failed to show that defendant Brown regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered, in New York. Plaintiff therefore, cannot satisfy CPLR 302(a)(3)(i). *Ingraham v Carroll*, 665 NY2d 10 [1997]. Moreover, to satisfy CPLR 302(a)(3)(ii), plaintiff must show that defendant Brown reasonably expected its allegedly tortious foreign act to have New York consequences. Mere presence of the product in New York is not sufficient to establish jurisdiction (See *Worldwide Volkswagen Corp. v Woodson*, 444 US 286 [1980])and mere forseeability is not enough. Forseeability must be coupled with evidence that the defendant made a discernable and sufficient effort to directly or indirectly serve the New York marketplace. McLaughlin; Practice Commentaries; McKinneys Cons. Laws of New York, Book 7B; CPLR @ 302:24 at 113). *Martinez v Am. Std.*, 457 NYS2d 97 [2nd Dept.1982]; *Cortlandt Racquet Club, Inc. v Oy Saunatec, Ltd.*, 978 F.Supp 520 [SDNY 1997]; *Schaadt v T.W. Kutter, Inc.*, 169 AD 2d 969 [3rd Dept.1991].

These holdings are consistent with decisions which decline to find jurisdiction of small, portable products even where the manufacturer or retailer was aware that the product may find its way to the forum state. *Asahi v Superior Ct. Of Cal.*, 480 US 102 [1987]. Here, there is no admissable evidence that defendant Brown invoked the benefits of New York law. In this regard, plaintiff's reliance on *United States v Caverna*, 550 F.3d 180 [2nd Cir.2008] is misplaced. Therein, the buyer of illegal guns traveled from New York to Florida to purchase firearms from an individual who knew they were to be transported back to New York for re-sale.

Finally, as aforementioned, there is no evidence that defendant Brown derived substantial revenue from goods used or consumed, or

services rendered in New York or sold in interstate commerce. The "evidence" that defendant Brown sold some 630 guns is unreliable and unpersuasive.

Therefore, plaintiffs have failed to persuade this Court that it has personal jurisdiction over defendant Brown pursuant to CPLR 302(a)(3).

Notwithstanding this conclusion, personal jurisdiction over defendant Brown would, however, be violative of his due process rights as well as fundamental notions of fairness and substantial justice. As is well settled, personal jurisdiction over defendant Brown will lie only if (1) he has sufficient minimum contacts with New York State that he could reasonably anticipate participating in the judicial process therein and (2) assuming such contacts, the notions of fair play and substantial justice are not offended. See *LaMarca v Pak-Mor Refg. Co.*, 95 NY2d 210 [2000]. As the Due Process Clause is used to provide some semblance of predictability to a defendant's conduct, and allow him or her to gauge where that conduct may render them amenable to lawsuits, the forum must be one where the defendant has some minimum nexus. "In determining whether minimum contacts exist, the Court must consider the relationship among the defendant, the forum and the litigation". See *Keeton v Hustler Magazine, Inc.*, 465 US 770 [1984].

Merely placing a product into commerce, without more, is not enough to establish some purposeful activity towards the forum state, as is required to establish personal jurisdiction. *Asahi Metal v Sup. Ct. of California*, 480 US 102 [1987]; *Worldwide Volkswagen*, 444 US @ 297.

The record is completely devoid of any evidence that defendant purposefully availed himself of the rights and responsibilities of conducting business in New York State, and thus, the exercise of jurisdiction over him would violate his 14th amendment due process rights. In light of the foregoing finding, it is unnecessary to evaluate whether the exercise of jurisdiction over defendant Brown would violate the 14th Amendment's

requirement that jurisdiction must comport with notions of fair play and substantial justice. As the record is devoid of any minimum contacts between defendant Brown and the State of New York, it is unnecessary to take this inquiry any further. Therefore, Plaintiffs First Amended Complaint is dismissed as against defendant Brown.

Finally, Defendant MKS moves this Court for a dismissal pursuant to CPLR 3211(a)(2) and 3211(a)(7).

Defendant MKS is a federally licensed wholesale distributor of firearms. As is conceded, Defendant MKS purchased the subject pistol from Defendant Beemiller and sold it to Defendant Brown. The claims asserted against Defendant MKS are identical to those asserted against the corporate co-Defendants; (1) negligent distribution and sale of the subject firearms, (2) negligent entrustment, (3) negligence per se, (4) public nuisance and (5) statutory violations.

In brief, Defendant MKS seeks to avail itself of the protections afforded sellers of firearms under the PLCAA as well as alleging that Plaintiffs failed to state a cause of action in negligence. Defendant MKS reminds this Court of its duty to give meaning to the intent of the legislature in enacting the PLCAA, to wit, to protect businesses in the manufacture and sale of firearms where the product functions as designed and intended, but causes harm due to misuse by a third party. 15 USC §7901, et al; McKinneys Cons. Law of NY Book of Statutes, §124; *Riley v County of Broome*, 95 NY2d 455 [2000]; *People v Finnegan*, 85 NY2d 53 [1995]; *People ex rel Harris v Sullivan*, 74 NY2d 305 [19889]; *Doctors Council v NYC Employee's Retirement System*, 71 NY2d 669 [1988].

Therefore, as with Defendant Beemiller's motion, it is incumbent upon this Court to ensure that the PLCAA, with its protections from liability, applies.

In order to avail itself of the protections of the PLCAA, defendant

MKS must satisfy a two prong analysis. Preliminarily, defendant MKS must establish that the plaintiff's First Amended Complaint is a qualified civil liability action pursuant to 15 USC §7903(5)(A). There seems to be no dispute that defendant MKS is a seller of a qualified product as defined by the PLCAA. Moreover, there can be no argument from the record before this Court that defendant Caldwell criminally or otherwise, unlawfully misused the otherwise qualified product.

Thus, defendant MKS is entitled to the protections of the PLCAA unless any of the causes of action pled fall within an exception to the definition of qualified civil action, which otherwise mandates immediate dismissal.

The causes of action sounding in negligence and public nuisance are not exceptions to the application of PLCAA. See *City of NY v Beretta*, 524 F 3d 384 [2nd Cir.2008]. The three remaining causes of action alleged must now be evaluated.

The first, negligent entrustment, is defined in the PLCAA as "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 USC §7903(5)(B).

In plaintiff's First Amended Complaint, the gravaman of plaintiff's allegations of negligent entrustment alleged against defendant MKS is that defendant MKS negligently permitted defendant Brown to acquire possession of the subject pistol when it "knew or reasonably should have known that he intended to, or was likely to, use it in a manner as to create an unreasonable risk of harm to others" (Plaintiff's First Amended Complaint at ¶ 202). Plaintiff further contends that the pistol was under defendant MKS's control, that defendant Brown came into possession of it with defendant MKS's

consent, and that defendant MKS knew, or had reason to know, that defendant Brown would use the pistol in a manner involving unreasonable risk of physical injury to others" (¶¶ 203-205). However, the complaint also concedes that defendant Brown is, in fact, a federally licensed firearms dealer (¶¶ 18-29).

The negligent entrustment exception cannot lie as against a seller unless there is a knowing sale to a person who cannot legally possess it or whom the seller has reason to believe will use the firearm for a purpose other than intended. A review of the legislative history supports a narrow and limited exception to the general protections afforded manufacturers and sellers of firearms under the PLCAA. (Please refer to 157 Cong. Record, H9004; 157 Cong. Record, 59062).

As is conceded herein, defendant MKS did not sell the subject firearm to defendant Caldwelll, the ultimate shooter. Instead, defendant MKS sold the firearm to a retailer possessed of a valid federal firearm license. Thus, by the definition of negligent entrustment found in the PLCAA, a negligent entrustment cause of action is only actionable herein if defendant MKS sold directly to the person misusing the product. There can be no negligent entrustment cause of action by virtue of defendant MKS' sale to defendant Brown. Therefore, the negligent entrustment cause of action against defendant MKS must be dismissed , as it is not an exception to application of the PLCAA.

In addition, plaintiff asserts a cause of action against defendant MKS sounding in negligence per se. (Please refer to Plaintiff's First Amended Complaint - at Court 3). Plaintiff alleges that defendant MKS "knowingly or recklessly created or maintained a public nuisance in violation of NY Penal Law §400.5(1) and 240.45(1). In addition, plaintiff alleges that defendant MKS conspired with, and/or aided defendant Bostic in the illegal sale, exchange or disposition of the subject firearm in violation of NY Penal Law

§265. (Please refer to Plaintiff's First Amended Complaint at pages 219, 220-224).

A negligence per se cause of action is founded on a violation of a statute designed to protect a limited or narrow class of persons of which the plaintiff is a member, from a particular type of harm, where a private cause of action has been determined to exist.

On review of the statutes alleged to have been violated by defendant MKS, none can support a negligence per se claim. New York Penal Law §400.05(1) pertains to the disposition of weapons by police or peace officers, and therefore, does not set forth a cause of action for nuisance. *Spitzer v Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept.2003].

Plaintiff further offers NY Penal Law §240.45(1) as a statute, the violation of which is sufficient to support a negligence per se claim. NY Penal Law §240.45(1) is a criminal nuisance statute which requires proof of conduct, either unlawful or unreasonable, which creates a condition which endangers the health or safety of a considerable number of persons or maintains any premises where persons gather for unlawful conduct.

However, NY Penal Law §240.45(1) cannot serve as a basis for a negligence per se claim in that it is merely the codefication of common law nuisance, and does not afford a private right of action. See *Copart Industries, Inc. v Consolidated Edison Co. of NY Inc.*, 41 NY2d 564 [1977]; *New York Trap Rock Corp v Town of Clarkson*. 299 NY 77 [1949]; *State v Wright Hepburn Webster Gallery, Ltd.*, 64 Misc.2d 423 [Sup.Ct. New York Co.,1970]. Moreover, as the purported transfer of the subject firearm as between defendant MKS and defendant Brown took place entirely within the State of Ohio, it cannot be said that the transfer was violative of the New York State Penal Law (*People v McLaughlin*, 80 NY2d 466 [1991]). Because the State only has the power to enact and enforce criminal laws within its territorial borders, there can be no criminal offense, and thus, no violation of

a predicate statute to except application of the PLCAA, where, as here, the allegation of criminal conduct between defendant MKS and defendant Brown occurred within the State of Ohio. (See Restatement of the Conflict of Laws §425, 428) CPL 20.20.

Finally, plaintiff alleges defendant MKS intentionally violated federal, state and local statutes, regulations and ordinances and that these intentional violations were a direct and proximate cause of the shooting and injuries sustained by plaintiff Williams. Please refer to Plaintiff's First Amended Complaint, paragraphs 246 et seq. The plaintiff relies on another exception to the application of the PLCAA, often referred to as the "predicate exception", wherein liability may attach where it is found a seller of firearms knowingly violates a statute or other regulation regulating the sale or marketing of firearms. See *City of New York v Beretta USA Corp.*, 524 F.3d 384 [2nd Cir.2008).

Plaintiffs rely on *City of New York v A-1 Jewelry & Pawn, Inc.*, 247 FRD 296 [EDNY 2007], as support that the referenced Penal Law provisions afford the requisite predicate violation for an exception to application of the PLCAA. However, this issue has been addressed by the Second Circuit in *City of New York v Beretta U.S.A. Corp.*, supra, wherein the Court held that Penal Law §240.45 is not a statute applicable to the sale or marketing of firearms, and thus, reliance thereon is misplaced.

A reading of Penal Law §400.05(1) indicates it supplies a procedure or protocol for the destruction of firearms, unlawfully possessed and determined to be a nuisance. It is not a statute or ordinance regulating the sale or marketing of firearms, and thus, cannot serve as a predicate exception to an application of the PLCAA (see generally, *Maio v Kralik*, 70 A.D.3d (2nd Dept.2009].

Finally, plaintiffs' reliance on Penal Law §265.11-13 is equally misplaced. The statute prohibits the sale of firearms by persons not authorized to possess same. Defendant MKS is possessed of a valid federal

firearms license and is therefore, lawfully entitled to possess and engage in their sale.

Therefore, the plaintiffs have failed to establish a predicate exception to the application of the PLCAA.

Brief mention is warranted with regard to plaintiff's claim of negligence as against defendant MKS. As is axiomatic, a negligence claim requires plaintiff to allege the existence of a duty to the plaintiff to protect him or her from harm, the breach of that duly and resultant damages. *Boltax v Joy Day Camp*, 67 NY2d 617 [1989].

The issue of duty as it relates to gun manufacturers and distributors has been addressed by the Court in the State of New York. On review, it is evident that liability will not be imposed absent a special relationship between the manufacturer/distributor and the actor, or between the manufacturer/distributor and victim.

In *Hamilton v Beretta USA Corp.*, 96 NY2d 222 [2001], the Court of Appeals, recognizing that the threshold question in any negligence claim is whether defendant owes plaintiff a duty of care, answered that question in the negative when evaluating the liability of a gun manufacturer/distributor brought by victims of gun violence. Absent some special relationship, no duty exists. See generally *Forni v Ferguson*, 232 AD2d 176 [2nd Dept.1996]; *Purdy v Public Adm'n of County of Westchester*, 72 NY2d [1988]; *Pulka v Edelman*, 40 NY2d 781 [1976]; *Elsroth v Johnson & Johnson*, 700 F.Supp 151 [SDNY 1988].

Plaintiff has failed to set forth any special relationship that would support a negligence cause of action, and therefore, has failed to state a cause of action pursuant to CPLR 3211(a)(7). It is unnecessary to reach the issue of proximate cause.

Finally, with regard to plaintiffs allegation of public nuisance, it is well settled that a private citizen has no public nuisance cause of action. This issue has been specifically addressed in *Smith v Atlantic Gun and*

Tackle, 376 F.Supp 2d 291 [EDNY 2005]. Therein, the Court dismissed plaintiff's public nuisance cause of action against a distributor and retailer of a firearm, holding "plaintiff cannot establish particular danger to this plaintiff, as distinguished from all other New York City residents, from the alleged nuisance prior to the actual killing" (F.Supp at 292). See also, *NAACP v Acusport, Inc.*, 271 F.Supp 2d 435 [EDNY 2003]. Courts regularly dismiss plaintiff's nuisance claims in the manufacture/sale of firearms context, where the sales at issue were legal, preferring to refer the issue to the various legislative bodies, who are better suited to address the otherwise heavily regulated firearms industry. See *People ex rel Spitzer*, supra, *NAACP*, supra.

Therefore, defendant MKS' motion to dismiss Plaintiff's First Amended Complaint, as well as the derivative claim asserted on behalf of plaintiff Edward Williams, is granted.

Finally, plaintiffs challenge the constitutionality of the PLCAA, if found applicable. As implemented, the PLCAA requires courts to dismiss "qualified actions" against gun manufacturers and sellers for claims brought for damages stemming from criminal or unlawful misuse of a firearm by a person or persons other than its manufacturer or seller. 15 USC 7902, 7903. As applied, the PLCAA does not mandate dismissal of all such claims, and affords a "safe harbor" for certain exceptions. As it has been determined by this Court that the plaintiffs' claim does not fall into such a protected class, plaintiffs will now argue that the PLCAA is unconstitutional.

This Court is not without guidance, as this issue has merited considerable judicial scrutiny.

Preliminarily, plaintiffs argue that the PLCAA is unconstitutional as it transgresses the separation of powers principle, which prohibits Congress from directing the outcome of a pending action without changing the underlying substantive law. Specifically, the plaintiffs argue that the

application of the act, and the dismissal of pending actions against gun manufacturers and sellers violates the fundamental principle of separation of powers doctrine, which basically forbids legislatures from prescribing decisions to the judiciary in pending cases. *United States v Klein*, 80 US 128 [1971].

However, the PLCAA does not violate the separation of powers doctrine when, as here, the new rule of law, concededly applicable to prospective cases commenced following enactment, is also made applicable to pending cases. See *City of New York v Beretta*, 524 F.2d 384 [2nd Cir.2008]; *Estate of Pascal Charlot v Bushmaster Firearms, Inc.*, 628 F.Supp 2d 174 [D.C.2009]; *Ileto v Glock, Inc.*, 565 F.3d 1126 [9th Cir.2009].

Further, plaintiffs argue that the PLCAA violates plaintiffs right to equal protection or substantive due process. This argument was rejected by the 9th Circuit in *Ileto v Glock*, supra @ 1078. Therein, the Court, addressing the balance of Congressional acts against individual equal protections or substantive due process rights:

"There is nothing irrational or arbitrary about Congress' choice here. It saw fit to adjust the incidents of our economic lives by preempting certain categories of cases brought against federally licensed manufacturers and sellers of firearms. In particular, Congress found that the targeted lawsuits constitute [d] an unreasonable burden on interstate and foreign commerce of the United States 15 USC §7901(a)(6) and sought to prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce, id 7901(b)(4). Congress carefully constrained the Act's reach to the confines of the commerce clause. e.g., id §7903(2) (including an interstate - or foreign - commerce element in the definition of manufacturer); id §7003(4) *Ileto*, supra @1141.

Thus, applying a rational basis test, the Court declined to find a

suspect class of individuals adversely affected by application of the PLCAA.

In addition, plaintiffs challenge the PLCAA on First Amendment grounds, i.e. as an obstacle in a citizen's right to seek redress. This argument has been rejected in *Beretta*, supra, and *Ileto*, supra.

While the PLCAA clearly exempts from liability sellers and manufacturers in certain, specified and qualified civil actions, it does not unlawfully impede or foreclosure the possibility of judicial redress for the plaintiffs. See *Beretta*, supra; *Tennessee v Lane*, 541 U.S. 509 [2004]; *Garacia vWyeth-Ayerst Labs*, 385 F.3d 961 [6th Cir.2004]. Thus, the PLCAA does not deprive the plaintiffs of the First Amendment right of access to judicial redress.

Finally, plaintiffs allege that the PLCAA violates the Tenth Amendment and fundamental principles of federalism. However, this constitutional challenge has been rejected by various courts addressing the issue, and no different result is warranted herein. See *Beretta*, supra.

DATED: April 25, 2011

Hon. FREDERICK J. MARSHALL
Justice, Supreme Court

GRANTED

APR 25 2011

BY SALLY M. LEMLEY
COURT CLERK